84-758 (1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

VINCENT CACI,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MATTAR, D'AGOSTINO, KOGLER & RUNFOLA
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27 pp

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QUESTIONS PRESENTED FOR REVIEW

Where an offense is punishable as both a felony and a misdemeanor, is the government obligated to instruct the Grand Jury on both charges?

The Court below answered in the negative.

Is 18 U.S.C. Section 1001 pre-empted by 31 U.S.C. Sections 5316 and 5322.

The Court below answered in the negative.

PARTIES

The petitioner is Vincent Caci.

The respondent is the United States of America.

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Petitioner, VINCENT CACI, seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 10, 1984.

OPINION BELOW

The United States Court of Appeals for the Second Circuit issued a written opinion which is annexed hereto as Exhibit "A". This opinion has not yet been published.

JURISDICTION

VINCENT CACI was found guilty in the United States District Court for the Western District of New York, by a jury, of the offense of making false statements and concealing a material fact in a matter within the jurisdiction of the U.S. Customs Service in violation of 18 U.S.C. Section 1001 on February 9, 1984. On April 16, 1984, United States District Judge Charles L. Brieant, of the Southern District of New York, sitting by designation, entered judgment and imposed

sentence.

On September 10, 1984, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction. On October 9, 1984, the United States Court of Appeals for the Second Circuit denied Petitioner's motion for an enlargement of time to file a Petition for a Rehearing in Banc.

This Petition is seasonably filed within sixty days of the affirmance by the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Section 1001

STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false, fictitious or

fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

31 U.S.C. Section 5316

REPORTS ON EXPORTING AND IMPORTING MONETARY INSTRUMENTS

a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this action when the person, agent, or bailee knowingly -

(1) transports or has transported monetary instruments of more than $5,000.00 at one time -

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the

United States from or through a place outside the United States.

31 U.S.C. Section 5322(a)
CRIMINAL PENALTIES

a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000.00, imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

A. Statement of Procedure

At pretrial proceedings, the defendant, by motion dated December 6, 1983, moved for a dismissal of the indictment based on the government's failure to instruct the Grand Jury on 31 U.S.C. Section 5316 and, in that same

motion, moved to dismiss the indictment on the ground that 31 U.S.C. Sections 5316 and 5322 pre-empted 18 U.S.C. Section 1001. The trial Court, by order dated January 12, 1984, denied both motions and in the appeal which ensued, the United States Court of Appeals for the Second Circuit affirmed.

B. Statement of Facts

On October 7, 1983, the petitioner entered the United States from Canada, via the Peace Bridge, located at Buffalo, New York. While at the Peace Bridge, the defendant was referred to a secondary inspection area. The government's evidence tended to show that the petitioner, while at the secondary inspection area, denied that he was in possession of in excess of $5,000.00 in monetary instruments. A search of the

petitioner revealed that he had the sum of $26,660.00 on his person. The petitioner was arrested and indicted for a violation of 18 U.S.C. Section 1001 and ultimately convicted of that charge.

REASONS FOR GRANTING THE WRIT

A false statement regarding the possession of more than $5,000.00 in monetary instruments could not constitute an offense under 18 U.S.C. Section 1001 without the existence of 31 U.S.C. Section 5316. Congress, in enacting the requirement that a report be made, also set forth a specific penalty for failure to do so. 31 U.S.C. Section 5322. Failure to report more than $5,000.00 in monetary instruments constitutes both a felony and misdemeanor. The government conceded in the trial Court that it

instructed the Grand Jury only with respect to 18 U.S.C. Section 1001 and gave no Grand Jury instructions on 18 U.S.C. 5316 and 5322. In holding that a prosecutor can present to the Grand Jury an act punishable as a felony and ignore the fact that the act is punishable as a misdemeanor gives that prosecutor unfettered discretion. Permitting the prosecutor to control whether a particular act would be punished as a misdemeanor or a felony reaises serious constitutional questions of due process and equal protection. Berra v. United States, 351 U.S. 131, at page 139-140. There is no doubt that the selectivity in the enforcement of the criminal law is subject to constitutional restraints of equal protection and due process. The

government in this case, by giving no reason or justification whatsoever for presenting the felony and not the misdemeanor to the Grand Jury, nor giving instructions to the Grand Jury in this regard, has sub silentio, created an arbitrary classification in currency-border cases. To elect not to prosecute this case under 31 U.S.C. 5316 and 5322, the government has created a class of citizens that will be prosecuted more vigorously, those who fail to declare money in excess of $5,000.00 when entering the United States. This is not a proper consideration by the government and creates an arbitrary classification in violation of due process and equal protection.

By reason of the foregoing, the government, in the Western District of New

York, has rendred meaningless 31 U.S.C. 5315 and 5322 in that the government has elected to prosecute these cases as felonies rather than misdemeanors.

To continue to permit the Second Circuit and the Western District of New York to arbitrarily decide how to prosecute currency-border cases would pre-empt the authority of Congress. As the Court of last resort, the time has come to implement Rule 17.1(C) of the Supreme Court Rules and allow review of this most urgent question.

CONCLUSION

For all these reasons, the Court should grant this petition for certiorari.

DATED: November 6, 1984
Buffalo, New York

Respectfully submitted,

By Thomas C. D'Agostino

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of September, one thousand nine hundred and eighty-four.

PRESENT:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
Circuit Judges.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against- 84-1148

VINCENT CACI,

Defendant-Appellant.

----------x

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Appellant argues that because his act was punishable as both a felony and a misdemeanor the government was obliged to bring both charges before the Grand Jury. We disagree. It is well settled that when an act violates more than one statute, what, if any, charge to bring rests in the prosecutor's discretion. See United States v.

Batchelder, 442 U.S. 114, 123-24; United States v. Pick, 724 F.2d 297, 301 (2d Cir. 1983).

2. Appellant argues that the government failed to offer any proof of agency jurisdiction, that such jurisdiction is an essential element of a violation of 18 U.S.C. Section 1001, and that therefore the district court was wrong to take judicial notice of agency jurisdiction and to so instruct the jury. Agency jurisdiction under Section under 1001 is a question of law for the court, see United States v. Diaz, 690 f.2d 1352, 1357 (11th Cir. 1982), and the Customs Service's question about the money was plainly within its jurisdiction, see United States v. Grotke, 702 F.2d 49, 53 (2d Cir. 1983). The district court appropriately took judicial notice of agency jurisdiction.

3. Appellant argues that the district court erred in not instructing the jury on materiality. We disagree. Materiality is not an element of the offense of making a false statement in violation of 18 U.S.C. Section 1001. See United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir. 1984).

4. Appellant's claim that 18 U.S.C. Section 1001 is preempted by 31 U.S.C. Sections 5316, 5322 is also without merit. In Grotke, supra, 702 F.2d at 54, this Court rejected the argument that the predecessors to sections 5316 and 5322 preempted 18 U.S.C. Section 1001. The subsequent congressional amendments did not affect this holding. See H.R. Rep. No. 651, 97th Cong., 2d Sess. 301, Table 2A, reprinted in 1982 U.S. Code Cong. & Ad. News 1895, 2195.

5. We have considered all of

appellant's contentions and they are without merit.

WILFRED FEINBERG, Chief Judge

THOMAS J. MESKILL,

JON O. NEWMAN,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 1984, within sixty days from September 10, 1984, the date of the Judgment of the United States Court of Appeals for the Second Circuit, I deposited 40 legible copies of Petitioner's Petition for Certiorari at the general post office, Buffalo, New York, with sufficient first class postage prepaid, directed to Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20543 and 3 copies directed to Salvatore R. Martoche, United States Attorney, Western District of New York, Attention Joseph M. Guerra, III, A.U.S.A., United States Courthouse, Buffalo, New York 14202. I declare all of the above under the penalties of perjury.

DATED: Buffalo, New York
November 8, 1984

Thomas C. D'Agostino, Esq.
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of the United States of America
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